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SC Court of Appeals

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBUG
IN THE COURT OF COMMON PLEAS
Price Oulla and Bonnie Oulla

JUDGMENT IN A CIVIL CASE

CASE NO. 2014- CP-38-01590

Lisa Velazques, Harbison Community Association, Inc.
Cody Sox and Patten Seed Company, d/b/a Super-Sod

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: James B. Jackson, Jr., Special Circuit Judge	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

FILED FOR RECORD
MINNIE B. CLARK
AUG 14 2017
CLERK OF COURT
ORANGEBURG COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION :

PLAINTIFF'S MOTION TO VACATE JUDGMENT PURSUANT TO RULE 60 SCRPC IS DENIED.

This order ends does not end the case

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2014-CP-38-01590

Price Oulla and Bonnie Oulla,

Plaintiffs,

v.

Lisa Velazques,
Harbison Community Association, Inc.,
Cody Sox, and
Patten Seed Company, d/b/a Super-Sod,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION
FOR RELIEF FROM JUDGMENT

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SC Court of Appeals

CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA
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SOUTH CAROLINA

This matter came before the Court on the Plaintiffs' Motion for Relief from Judgment pursuant to Rule 60 SCRPC. After the Court granted Summary Judgment in favor of Patten Seed Company d/b/a/ Super-Sod ("Super-Sod"), Plaintiffs appealed. The Court of Appeals, by Order dated March 23, 2017, granted Plaintiffs leave to file a motion in this Court pursuant to Rule 60 SCRPC and held the appeal in abeyance for 90 days pending the resolution of Plaintiffs' Motion.

The Court held a hearing on the Motion on June 6, 2017. William Applegate, counsel for the Plaintiffs appeared and argued the Motion on behalf of the Plaintiffs. E. Raymond Moore, III and Charles H. Williams appeared and argued on behalf of Super-Sod. Having considered the arguments and submissions of counsel, for the reasons set forth below, Plaintiffs' Motion for Relief from Judgment is **DENIED**.

FACTUAL BACKGROUND

This case arose out of a rear end automobile collision that occurred outside of Orangeburg in the westbound lanes of I-26 near Exit 154 when Lisa Velazques struck Mr. Oulla's vehicle from the rear after he had slowed for traffic ahead on the interstate. The accident occurred in broad daylight and Ms. Velazques offered no explanation as to why she was unable to see traffic slowing ahead until it was too late to avoid the accident.

ARM #1

CLERK OF COURT
ORANGEBURG COUNTY

That same morning, and long before the accident, Cody Sox, a Harbison Community Association ("Harbison") employee, picked up a load of sod at Super-Sod. Before traveling to Super-Sod, Sox verified that his trailer was adequate for the load. Sox directed Super-Sod's field worker where and how to load the pallets on the Harbison trailer. The load consisted of two pallets of centipede sod, wrapped with .7 mil stretch wrap. Sox did not have tie down straps with him, although he had intended to bring them with him. Super-Sod's sole involvement was that its employee loaded Harbison's trailer with two pallets of sod, according to Sox's instructions. After loading, Sox checked his tires and hitch; made sure the trailer looked balanced and verified the weight was balanced.

Super-Sod did not sell or offer to provide a tarp to cover the sod or tie down straps for Sox to use on the Harbison trailer. The sod appeared in a safe and stable condition to Sox after it was loaded. Sox knew that he was required to secure his own load. Sox testified that he had intended to bring tie down straps from Harbison's inventory, but because of a miscommunication with his co-worker, they forgot to bring them. Sox asked Super-Sod's employee if he had tie down straps and was told no. He did not request that Super-Sod tie down his load. Sox then made a decision to proceed without tying down the load.

The Harbison truck and trailer safely left the field where the sod was picked up, safely traveled down Highway 301 reaching up to 50 mph, and stopped at a gas/convenience/fast food store at the intersection of I-26 and Highway 301 where Sox and his co-worker purchased lunch. While there, Sox checked the load and noted that it was in the same condition in which it had been loaded. No sod had spilled. The sod had not shifted. The stretch wrap covering the pallets was intact. After leaving the convenience store, the Harbison truck and trailer were able to enter the



interstate safely, navigating around the tight clover leaf entrance ramp on to I-26 without losing any sod.

Once on the interstate, a tractor trailer suddenly veered into the Harbison truck and trailer's lane. Sox took sudden and evasive action running off the road and on to the shoulder. Due to the sudden evasive maneuver, Sox lost a portion of the sod from both pallets. Sox promptly pulled over and stopped on the shoulder of the interstate after losing the sod and called 911. Traffic continued to drive over the lost sod without incident. A fire engine eventually responded and blocked traffic in the right (slow) lane of the interstate so that the sod could be cleaned from the roadway.

Ms. Velazques admitted that she was at fault for the accident because she struck Plaintiffs at a high rate of speed. It was undisputed that Velazques was not looking at the road in front of her at the time her car rear-ended the Plaintiffs' vehicle. Further, the accident between Plaintiffs and Velazques did not occur either immediately in time after the sod fell off the trailer or near the fallen sod on the interstate.

PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint on December 31, 2014. Super-Sod filed its Motion for Summary Judgment on May 6, 2016, and the parties argued the Motion before Judge McMahon the afternoon of June 29, 2016. The afternoon before the hearing, Plaintiffs filed a Motion to Amend the Complaint to add a cause of action for breach of implied warranty of merchantability and amending the existing negligence action to plead section 56-5-4100 created a legal duty.

Both at the hearing before Judge McMahon and in their Memorandum in Opposition to the Motion for Summary Judgment, Plaintiffs argued section 56-5-4100 imposed a legal duty on Super-Sod to secure sod to its customers' vehicles and trailers and that the duty extended to

"members of the travelling public." However, Plaintiffs did not argue that summary judgment was premature or otherwise improper because they had just filed a Motion to Amend, or that the proposed Amended Complaint contained an additional cause of action that might preclude summary judgment. Judge McMahon ultimately held that Super-Sod did not owe a duty to the Plaintiffs. In his Order, Judge McMahon specifically addressed the application of section 56-5-4100. After Judge McMahon's ruling, Plaintiffs filed their Rule 59(e) Motion, which Judge McMahon denied, without a hearing by Order dated November 18, 2016.

While the Rule 59(e) motion was pending, the parties appeared before Judge Goodstein related to the Motion to Amend. Although Judge Goodstein heard argument from the Plaintiffs, she ruled that because judgment had been entered and because of the pending Rule 59(e) Motion, jurisdiction over the matter remained with Judge McMahon and that "the status of the Motion to Amend would be determined by his ruling." Plaintiffs thereafter provided Judge McMahon with the Motion to Amend and significant briefing related to the Motion to Amend prior to his denial of their Rule 59(e) Motion. However, it was only after the judgment had been entered against them that the Plaintiffs attempted to raise the issues within their Motion to Amend.

After Judge McMahon denied Plaintiffs' Rule 59(e) Motion, Plaintiffs appealed to the South Carolina Court of Appeals. Plaintiffs sought leave from the Court of Appeals to file this Rule 60 motion to vacate the order granting summary judgment. On March 23, 2017, the Court of Appeals issued an order granting Plaintiffs' motion for leave to file the Rule 60 motion and holding the appeal in abeyance for ninety days so that this Court could address the motion.

LEGAL ANALYSIS

Because Plaintiffs have failed to set forth a valid basis to vacate the judgment under Rule 60, the Motion is denied. A court may vacate a judgment under Rule 60(b) only in narrow

circumstances. Rule 60(b), SCRCP. While the decision to grant or deny a Rule 60(b) motion lies within the discretion of the trial judge,¹ the criteria are narrow and provide only five bases, none of which the Plaintiffs have established here:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b), SCRCP. A party seeking to set aside a judgment has the burden of presenting evidence entitling him to the requested relief. Auto Owners Ins., Co. v. Rhodes, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009) aff'd in part, rev'd in part, 405 S.C. 584, 748 S.E.2d 781; McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), aff'd 395 S.C. 85, 716 S.E.2d 887.

Plaintiffs have not established any "mistake, inadvertence, surprise or excusable neglect" in responding to the Motion for Summary Judgment or any other aspect of the case. Super-Sod's Motion for Summary Judgment was filed after significant discovery and well in advance of the hearing. Plaintiffs briefed the issues and presented affidavits and other exhibits. Plaintiffs acknowledged communications in advance of the hearing with Super-Sod's counsel that the proposed Motion to Amend would not result in a continuance of the June 29, 2016 hearing before Judge McMahon. Plaintiffs do not claim they mistakenly thought the Motion to Amend had been filed or mistakenly believed Super-Sod had consented to the Motion to Amend.

¹ See Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 483 (2004) ("Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge.").

Plaintiffs make passing reference to “mistake and excusable neglect” by the Court’s “failure to issue a ruling” on the Motion to Amend. However, the “failure” was no failure at all, because the Motion to Amend was never properly raised before it. There is no requirement for the Court to consider a Motion to Amend prior to or at the same time when a hearing is held on a Motion for Summary Judgment. If the party moving to amend wants that motion heard, they must bring the matter to the attention of the Court. I find this was not properly done in this case when Judge McMahon heard the Motion for Summary Judgment. Judge McMahon did not make a mistake of law or mistakenly overlook an issue that was properly raised to him before judgment was entered. Rather, Plaintiffs did not raise their Motion to Amend before or during the hearing.

Further, Plaintiffs have not set forth any basis to vacate the judgment under subsections (2), (3), (4) or (5) of Rule 60 of the SCRPC.

Plaintiffs argue that this Court should consider their Rule 15 Motion to Amend under the rubric of a Rule 60 motion to vacate. However, such a procedure would be contrary to the long line of cases that hold a matter must first be raised in order to obtain post-judgment relief. A party cannot use a post-judgment notice to the court to raise an issue the party could have raised prior to judgment but did not. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (1990) (“Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier.”). Judge McMahon did not rule on the Motion to Amend in considering the Motion for Summary Judgment or the Rule 59(e) motion because this issue was not argued or otherwise presented to the court prior to the order granting Summary Judgment. Plaintiffs had ample time and opportunity to raise this issue prior to the court’s ruling granting Super-Sod’s Motion for Summary Judgment. However, Plaintiffs failed to do so until they filed their Rule



59(e) motion. Even the Rule 59(e) motion itself contained no more than a "passing reference" that they had filed the Motion to Amend.

Plaintiffs argue that they have a "good faith, colorable argument" to the lower court that the motion to amend the complaint should be granted. However, the procedural history of this case and the merits of the proposed amendment militate against granting the Rule 60 motion in order to grant the Motion to Amend. While Rule 15 provides that amendments should be "freely given when justice so requires and does not prejudice any other party," in this instance, given the age of the case, the extensive discovery that had been completed, the two scheduling orders that had been entered, the imminent trial, that Super-Sod had filed its Motion for Summary Judgment nearly two months prior to the hearing, the futility of the proposed amendment, and because of the prejudice to Super-Sod, the Court declines to grant the Plaintiffs' Motion for Relief from Judgment.

Plaintiffs waited eighteen months to file the Motion to Amend and proposed Amended Complaint. The original Scheduling Order in the case had already been amended to push back the trial date from June 15, 2016 to October 10, 2016. Super-Sod's Motion for Summary Judgment, outlining deficiencies in the Plaintiffs' theories of recovery, had been filed for two months before Plaintiffs' filed their Motion to Amend. Numerous depositions had been taken, including the depositions of Super-Sod's management and employees. Experts had already been identified by all parties and the parties were preparing for an imminent trial. Defending against a new warranty theory with less than three months to prepare a defense would have been extremely prejudicial. Further, the stretch wrap that surrounded the sod had been destroyed and no photographs, testing, or other data related to the stretch wrap was available. It is hard to conceive of a more prejudicial position to allow such an amendment.



Despite the liberal standard of Rule 15, where a motion to amend asserts a futile cause of action, denial is proper. Jennings v. Jennings, 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010). Here the proposed amendment is futile. First, the implied warranty statute that the Plaintiffs sought to add to their complaint did not impose a legal duty on Super-Sod. In fact, the circuit court already held that Super-Sod owed no duty to Plaintiff.

Further, the claim for breach of implied warranty of merchantability cannot succeed because there was no "implied warranty" that unsecured cargo will not come loose during transport. Super-Sod routinely allows for customers to pick up product from Super-Sod's field(s). In this case, defendant Harbison and its employee, Sox, picked up the sod from Super-Sod's farm in Orangeburg. Sox testified that he intended to bring tie down straps to secure the sod but simply "forgot." It is undisputed that Super-Sod does not sell or offer to customers tie down straps to secure the sod.

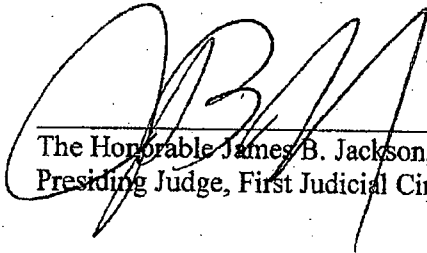
Plaintiff attempts to assert in its Motion to Amend that Super-Sod impliedly warranted that the sod was merchantable, "including that it was adequately contained and packaged." However, Comment 10 of the implied warranty of merchantability statute states that the "adequately contained [and] packaged" language "applies only where the nature of the goods and of the transaction require a certain type of container, package or label." (emphasis added). As Judge McMahon's Order explained, Super-Sod is not required to secure its product to the freight trucks of its customers. See MSJ Order ("South Carolina statutory law does not impose a duty on a loader of goods to 'tie them down' or ensure that they are tied down."); cf., Staubes v. City of Folly Beach, 339 S.C. 406, 414-15, 529 S.E.2d 543 (2000) (holding that it would be futile for plaintiff to amend its complaint to add a negligence claim because the trial court already granted summary judgment on any negligence claim). The sod purchaser, Harbison, and its employee Sox, knew

that Super-Sod had not sold or given him tie down straps, because, as Sox testified, he asked for them and Super-Sod told him they were not available. Harbison and Sox did not rely on Super-Sod to strap the sod to the trailer. Sox intended to bring its own straps but simply forgot. There can be no "warranty" implied for load securement when it is specifically not part of the sale. There was no "warranty" that the sod would withstand the sudden and evasive maneuver that Sox took to avoid a collision. Thus, even if timely, the proposed amendment would be futile and the Court would deny the Plaintiffs' Motion for Relief from Judgment on that basis as well.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Vacate the Judgment pursuant to Rule 60, SCRPC is **DENIED**.

SO ORDERED.



The Honorable James B. Jackson, Jr.
Presiding Judge, First Judicial Circuit

Orangeburg, South Carolina
July 10, 2017